Vijayaletchimy v Annamalai Chettiar

HIGH COURT (JOHORE BAHRU) — SUIT NO 22-382 OF 1987
ZAKARIA YATIM J
16 MARCH 1990

Land Law — Registered title — Indefeasibility of — National Land Code 1965, s 340

This is an application by the plaintiff for final judgment against the defendant for possession of a piece of land comprised in EMR 2179, lot no 3187 mukim of Pontian in the District of Pontian together with a house erected on the said land known as No 500 Jalan Alsagoff, Pontian, Johore (hereinafter called 'the said property'). The plaintiff claims that she is the registered owner and entitled to possession of the said property by virtue of a sale and purchase agreement entered into between the plaintiff and one Ramanathan Chettiar in which the latter agreed to sell the said property to the plaintiff for a sum of $60,000. The defendant claims that the said property was held by Ramanathan Chettiar on trust for and on his behalf and therefore the memorandum of transfer of the said property purported to have been executed by Ramanathan Chettiar to the plaintiff was illegal, void and of no effect.

Held, allowing the plaintiff's application:

(1) There is conclusive evidence that the plaintiff is the registered proprietor of the said land. Under s 340 of the National Land Code 1965 her title or interest in the said land is indefeasible unless the defendant can prove that the plaintiff obtained the registered title by fraud or misrepresentation. In the present case neither fraud nor misrepresentation was pleaded in the statement of defence.

(2) Except for a bare averment in the statement of defence that Ramanathan Chettiar held on trust one half of the said property for the defendant, there is not a shred of evidence that Ramanathan Chettiar held the defendant's half share on trust. It is obvious that the defendant has no defence at all.

[*Editorial Note*: The defendant has appealed to the Supreme Court vide Civil Appeal No 02-175-90.]

Cases referred to

1 *PJTV Denson (M) Sdn Bhd* v *Roxy (M) Sdn Bhd* [1980] 2 MLJ 136 (folld)
2 *UMBC* v *Palm & Vegetables Oils (M) Sdn Bhd* [1983] 1 MLJ 206 (folld)
3 *Pernas Sime Darby Holdings Sdn Bhd* v *M Poovanandran* [1986] 1 MLJ 418 (refd)

Legislation referred to

National Land Code 1965 s 340

V Reginald for the plaintiff.
Loh Song Chuan for the defendant.

Cur Adv Vult

Zakaria Yatim J: This is an application by the plaintiff for final judgment against the defendant for possession of a piece of land comprised in EMR 2179, lot no 3187, mukim of Pontian in the District of Pontian, together with a house erected on the said land known as No 500, Jalan Alsagoff, Pontian, Johore (hereinafter referred to as 'the said property'). The plaintiff also asks for costs and damages to be assessed.

The plaintiff claims that she is the registered owner and entitled to possession of the said property. In her statement of claim she alleged that sometime in February 1983 the defendant wrongfully entered and took possession of the said property and had wrongfully remained in possession thereof and had wrongfully failed and refused to deliver vacant possession of the said land.

In her affidavit affirmed on 13 September 1987, the plaintiff averred that by a sale and purchase agreement dated 15 July 1979, she purchased the said property from one Ramanathan Chettiar, the registered owner of the property, at a purchase price of $60,000. She became the registered owner of the said property on 20 January 1980. In support of her assertion that she was the registered owner of the said property as from 20 January 1980, she exhibited, in a subsequent affidavit affirmed on 5 March 1988, a copy of the sale and purchase agreement dated 15 July 1979, a copy of the title deed and a certificate of official search relating to the said property. The sale and purchase agreement was entered into between the plaintiff and Ramanathan Chettiar in which the latter agreed to sell the said property to the plaintiff for a sum of $60,000 free from encumbrances and with vacant possession. The title deed confirms that the said property was sold by Ramanathan Chettiar to the plaintiff on 20 January 1980. The certificate of the official research dated 23 February 1988 also shows that the plaintiff is the registered proprietor of the said property. The certificate, inter alia, states:

> Certificate of official search
>
> This is to certify that an official search has been made in pursuance of section 385 of National Land Code in respect of the following Mukim Pontian lot No 3187.
>
> Description and no of title EMR 2179 Area: OA or 38p and that at the date and time of issue of this certificate, the particulars of the said land are as follows:
>
> 1 Registered proprietors:
>
> Vijaya Letchimy d/o K Raman Nair.

The same certificate shows that the defendant had entered a private caveat but this caveat does not affect the plaintiff's claim. The caveat was entered on 4 October 1987, that is, after the plaintiff had filed her writ in this action.

In a subsequent affidavit affirmed on 16 December 1987, the plaintiff averred that she had been paying quit rents from 1980 to 1987 and assessment rates from 1980 to 1986. In support of her averment she exhibited all the rent receipts and assessment receipts to the affidavit.

The defendant, in his statement of defence, stated that in 1952 he and Ramanathan Chattiar were carrying on money-lending business in Pontian on equal shares. With the partnership money, both of them decided to purchase

a piece of land known as lot no 2258 in the mukim of Pontian under EMR 1228. The area of the land was about two acres. The defendant referred to an agreement dated 24 February 1955 and according to him pursuant to that agreement both he and Ramanathan Chettiar purchased the land from four persons in Pontian for a price of $13,000 and registered the land in the name of Ramanathan Chettiar. The defendant claimed that his one half undivided share of the land was held by Ramanathan Chettiar on trust for and on behalf of himself. The land was subsequently subdivided into eight lots, namely, lot nos 3180, 3181, 3182, 3183, 3184, 3185, 3186 and 3187. Immediately after the approval of the subdivision and issue of separate titles, both the defendant and Ramanathan Chettiar sold seven lots to seven purchasers for a total price of $35,000 thus making a profit of $22,000. With the profit both of them built a house on the remaining lot, ie lot no 3187 and the house was known as 500 Jalan Alsagoff, Pontian. The defendant claimed that his own half undivided share of the house and the land, lot no 3187, was held by Ramanathan Chettiar on trust for and on his behalf. He also claimed that since 1957, he became and still was the beneficial owner of one half undivided share of the house and the land. In para 3(10) of the statement of defence he stated that 'since ... 1987 until today the defendant was and still is paying all the quit rent, assessments and other charges in respect of the said house and the lot no 3187 to the relevant government authorities'. In para 4, the defendant alleged that 'the memorandum of transfer of the said house and lot 3187 purported to have been executed by ...' Ramanathan Chettiar to the plaintiff was 'illegal, void and of no effect'.

In his counterclaim, the defendant asked for a declaration that he is still the beneficial owner of one half undivided share of the said property and land and that Ramanathan Chettiar held the said one half undivided share on trust for and on behalf of the defendant. He also asked for a declaration that the transfer of the said house and land to the plaintiff was illegal, void and of no effect. The defendant further asked for an order (1) that the entries and memorials made in the Register of Titles in respect of the transfer of the said land be expunged; (2) that the plaintiff delivered the title deed to the defendant forthwith; and (3) that an injunction be granted to restrain the plaintiff from receiving rents and profits or selling or otherwise dealing with the said property. Subsequently, the plaintiff filed a reply and defence to the counterclaim.

Having examined a copy of the title deed and the certificate of official search exhibited to the plaintiff's affidavit affirmed on 5 March 1988, I find that there is conclusive evidence that the plaintiff is the registered proprietor of the said lands. Under s 340 of the National Land Code 1965, her title or interest in the said land is indefeasible unless the defendant can prove that the plaintiff obtained the registered title by fraud or misrepresentation. In *PJTV Denson (M) Sdn Bhd* v *Roxy (M) Sdn Bhd*,[1] Raja Azlan Shah CJ (Malaya), as he then was, in delivering the judgment of the Federal Court said at p 138:

> ... The concept of indefeasibility of title is so deeply embedded in our land law that it seems almost trite to restate it. Therefore the registration of the transfer of the said land under the National Land Code 1965 defeats all prior unregistered interests in that land unless the party who acquires the registered title has been guilty of fraud (see s 340(2)(a) of the National Land Code) ... Whether fraud exists is a question of fact to be decided upon the circumstances of each particular case ... Fraud must mean 'actual fraud, ie dishonesty of some sort for which the registered proprietor is a party or privy ...

In the present case, neither fraud nor misrepresentation was pleaded in the statement of defence. Indeed the defence had not raised anything in sub-s (2) of s 340 of the National Land Code 1965. In para 4 of the statement of defence the defendant merely made a bare allegation that the transfer of the said property from Ramanathan Chettiar to the plaintiff was illegal, void and of no effect. No particulars of illegality were pleaded. For the defence to allege fraud or misrepresentation, such allegation must be specifically pleaded and the necessary particulars of the alleged fraud or misrepresentation must be stated in the pleadings. See *Bullen & Leake & Jacobs* at p 1074. No such allegation has been pleaded in the statement of defence.

Except for a bare averment in the statement of defence that Ramanathan Chettiar held on trust one half of the said property for the defendant, there is not a shred of evidence that Ramanathan Chettiar held the defendant's half share on trust. There was not a single document exhibited to his affidavits to support his averment. There was no allegation of breach of trust. In any event, no particulars of breach of trust were pleaded in the statement of defence. The allegation of trust in the statement of defence is a bare allegation without any evidence to support it.

As already stated, in para 3(10) of the statement of defence the defendant averred that from 1957 until today he has been paying all quit rents, assessment and other charges in respect of the said property. In para 5 of his affidavit affirmed on 30 December 1987, the defendant confirmed that he made a mistake when he said that he paid the quit rents and assessments from 1957 until today. In the same paragraph, he said that he only paid quit rents and assessments from 1957 to 1959. He was however unable to produce the receipts. According to him all the receipts were collected by 'the previous owner V RM V Ramanathan Chettiar'. In the same paragraph he admitted that Ramanathan Chettiar was the previous owner. In that affidavit the defendant did not mention that he was previously the co-owner of the said property. Having read para 5 of the said affidavit and in view of what the defendant had pleaded in para 3(10) of the statement of

defence, it is clear that the defendant was not telling the truth in his pleading.

It should be added here that in para 5 of the affidavit the defendant was correcting what he admitted was an error in the statement of defence. In *UMBC* v *Palm & Vegetables Oils (M) Sdn Bhd*,[2] the Federal Court had ruled at p 207 that '... any defect or omission in the statement of claim cannot be made good by affidavit evidence ...'. The same rule applies to statement of defence. See *Pernas Sime Darby Holdings Sdn Bhd* v *M Poovanandran*.[3] In the instant case, I made reference to the affidavit to show that the defence is not a bona fide defence. Since para 3(10) of the statement of defence cannot be made good by para 5 of the affidavit, the averment in para 3(10) of the defence remains. In other words, the defendant has made a false averment in that paragraph because it is clear from the quit rent receipts and assessment receipts exhibited to the plaintiff's affidavit affirmed on 16 December 1987 that the plaintiff has been paying the said rents from the year 1980. It is obvious that the defendant has no defence at all. In my opinion, the whole defence is a sham defence and the counterclaim has no merit whatsoever.

In the circumstances, the plaintiff is entitled to have final judgment for possession of the said property and for damages to be assessed. I accordingly allow the plaintiff's application for final judgment against the defendant for possession of the said property with costs. I also order that damages suffered by the plaintiff be assessed by the senior assistant registrar.

Application allowed.

Solicitors: *Reginald Vallipuram & Co*; *Vincent Lai & Co.*

Reported by *Kevin Mathews*

Kuppusamy v Nithanathan

HIGH COURT (PENANG) — CIVIL SUIT NO 25-117-85
EDGAR JOSEPH JR J
12 MARCH 1990

Road Traffic — Negligence — Collision — Liability disputed — Plaintiff unable to testify due to injuries

Tort — Negligence — Road accident — Quantum of general damages

Damages (Personal Injury or Death) — Severe brain damage — General damages — Quantum

The plaintiff, a motor cyclist, suffered severe head injuries in a collision with a bus. He claimed damages for negligence against the defendant. The plaintiff was unable to testify in court due to amnesia; his case rested solely on the evidence of the sketch plan, photographs and damage to the vehicles. Special damages were agreed on before the trial, leaving the court to assess general damages.

Held, finding the defendant 50% liable:

(1) The road from which the plaintiff was emerging was a major road while the road from which the defendant driver emerged was a side road. Both the plaintiff and the defendant were under a duty of care to be on the lookout for other road users. However, there was a hindrance to both their views.

(2) Having regard to the evidence, the probabilities are that the collision occurred when the defendant driver had traversed about half of the junction. There was no evidence that the defendant driver stopped or slowed down before he emerged from the side road into the main road as he did not testify. It would therefore be wrong to assume in the absence of evidence that he did stop or slow down.

(3) On a balance of probabilities, the collision could not have occurred but for want of care on the part of both the plaintiff rider and the defendant driver. Having found that both are to blame and there being no means of distinguishing between them, the blame should be cast equally on each.

(4) General damages for pain, suffering and loss of amenity in the sum of $110,000 were awarded. Loss of future earnings was agreed at $34,902, loss of past earnings at $23,100 and other specials at $1,530. Interest was awarded at 3% pa on special damages from the date of accident to date of trial, and at 6% pa on general damages for pain, suffering and loss of amenity from the date of service of the writ. The judgment debt was to attract interest at 8% pa from the date of judgment until payment. The plaintiff was also awarded costs.

Cases referred to

1 *Humphrey* v *Leigh* [1971] RTR 363 (refd)
2 *Hussein & Anor* v *Maiden* [1970] 1 MLJ 114 (refd)
3 *Lew Voon Kong & Anor* v *Mustaffa bin Kamis* [1978] 1 MLJ 217 (refd)
4 *Harding (An Infant)* v *Hinchcliffe* The Times, 8 April 1964 (refd)
5 *Williams* v *Fullerton* (1961) 105 SJ 280 (refd)
6 *The 'MacGregor'* [1943] AC 197 (refd)
7 *Brown & Anor* v *Thompson* [1968] 2 All ER 708 (refd)
8 *Lang* v *London Transport Executive* [1959] 3 All ER 609 (refd)
9 *Chong Ying Khoon* v *Lee Joo Kam & Anor* [1988] 1 CLJ 795 (refd)